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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. [redacted] 17

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Respondent.

BRIEF OPPOSED TO GRANTING WRIT OF CERTIORARI.

In the preparation of this brief we shall endeavor to use same headings as used by the petitioners.

QUESTIONS PRESENTED.

We think the court will obtain an adequate conception the questions presented by a short statement of what s charged in the bill of complaint.

The bill charges not only a violation of statutory duty it charges what might be said to be common law or

equitable liability to repay the amount of the check. This was proper practice. (*Bowerman* v. *Hammer,* 250 U. S. 504.)

The bill charged that Ekstrom was the President of the Joint Company and as such he executed the check by which the funds were withdrawn from the failing Manufacturers Bank; that he knew the bank was in failing circumstances, because, before the check was drawn and before the check was cashed, he had attended a meeting of the Directors of the Bank held June 12, 1931, at which a Bank Examiner had in effect, stated that the affairs of the Bank were in such condition that it was likely that said Bank could not continue in business and could not continue as a national bank with ability to pay its creditors; that it was necessary that steps be taken to save said bank from collapse and that it was discussed in said meeting that it was advisable to endeavor to consolidate said bank with another bank in order to prevent the open insolvency of the Manufacturers Bank and that the Directors at said meeting at which Ekstrom was present, passed a Resolution giving authority to a National Bank Examiner to discuss the affairs of said Bank with any other bank in the City of Rockford with a view of having said bank take over the affairs of the Manufacturers Bank and to receive its assets and assume its liabilities; that it was then and there stated that in the situation which then existed in Rockford and was likely to exist within the next few days, it would be impossible for said Bank to continue to function as a National Bank unless the relief discussed was afforded said Bank. Ekstrom was present during all of the meeting and heard all of the discussion. (R. 3-4.) That Ekstrom as President of the Joint Company possessing the confidential information which he had learned at said meeting of the distress in which said Bank then and there was, caused the transfer of $42,761.12 of the funds of the Joint Company from the Manufacturers Bank to the

Third National Bank and that he caused said transfer to be made because of the information which he acquired at said Directors' meeting. (R. 5.)

It was also charged in the bill that in addition to the fact that the transfer was made under information which Ekstrom had acquired in a confidential relation with the Manufacturers Bank, that said transfer was made in contemplation of the insolvency of the Manufacturers Bank and was made with a view to prevent the application of the assets of the Manufacturers Bank in the manner prescribed by the laws of the United States with reference to National Banks and the distribution of their assets, and with a view to the preference of one creditor, the Mechanics Universal Joint Company, a corporation, of which he, the said Eric S. Ekstrom, was then and there President, to another, and to the other creditors of said Manufacturers Bank, all of which was in violation of the laws of the United States with reference to National Banks and the distribution of their assets upon insolvency.

Issue was joined on the allegations contained in the above bill and the case went to trial upon this branch of it, upon the issues thus joined.

The petitioners filed a counterclaim which set up that there were deposits made by the Joint Company in the Manufacturers Bank from May 6, 1931 to June 6, 1931, at a time when the bank was insolvent, but when it kept its doors open for business, and that the same amounted to a fraud. (R. 15.) There was a motion to strike this counterclaim because it did not contain the necessary element to charge a fraud, which was, that the Officers of the Bank knew at the time they received the deposits that the Bank was insolvent. The motion to strike was sustained, and an amended counterclaim was filed, which charged that at the time the deposits were received "it was knowingly insol-

vent." (R. 24.) A motion to strike this amended counterclaim was allowed and the petitioners filed a second amended counterclaim (R. 222), which set up the fact that at the time the deposits were received the Bank "was knowingly insolvent", and that "the active Officers in charge of, and daily managing and directing its banking business, were aware of and knew, its actual condition of insolvency" at the time the deposits were made (R. 224). To this second amended counterclaim the Receiver filed a reply denying the averments thereof and upon the issues thus joined upon this branch of the case, it went to trial before the Judge of the District Court.

Statement.

(1) The Manufacturers Bank closed its doors Saturday, June 13, 1931, at 1:30 P. M., never to open again. Appellant, Eric S. Ekstrom, was on said day and had been for many years then next last past, a Director of said Bank. He was and had been for some time a member of the Loan Committee. He was also then and there President of the Joint Company and was in the active management and control thereof devoting a large amount of his personal time and attention to the ordinary business of said corporation. On June 12, 1931, M. A. Baty, a National Bank Examiner in the employ of the Comptroller of the Currency, was in Rockford. He arrived in Rockford June 11, 1931, in response to the request of the President of the Rockford Clearing House Association, who was then also President of the Manufacturers Bank. He came because there was trouble in the banking situation in Rockford. The Security Bank was in trouble and was unable to continue in business.

(2) On Friday, June 12, 1931, Baty called a meeting of the Directors of the Manufacturers Bank. It convened in

the banking building of said Bank at 11:00 o'clock A. M. (R. 39.) Ekstrom was present at said Directors meeting. At that time Baty reported that the Security Bank felt it could no longer continue because of the drain on its deposits; that it had entered into a contract with the Swedish Bank for a take-over of its assets subject to final appraisement thereof. In the presence of Ekstrom, Baty told the Directors of the Manufacturers Bank, in view of the continued drain of its deposits the Manufacturers Bank had and were still having, that it would be for the best interests of the banking situation for said Bank to try and arrange some place to take their deposit liability under cover. Various members of the Board stated the Manufacturers Bank could stand on its own feet; they said they could stand any kind of a run that developed. Baty pointed out to them their low cash reserve; he said it was entirely too low for the Bank to weather any continued drain of deposits (R. 39); and that it was his opinion that they would require far greater cash reserve than they had. He also stated that if the Security Bank did not open the next Monday, there would be a very determined run at the Manufacturers Bank, and that whether or not the Security Bank was taken over by the Swedish Bank, there would probably be unrest that morning; that the contract for the take-over by the Swedish Bank of the deposit liability of the Security Bank was subject to appraisal, and if the take-over was brought to a successful conclusion it would happen Monday morning, June 15th. He also said, in his opinion this would create a disturbance among the public, among the depositors of all banks of Rockford; that there undoubtedly would be runs on every bank in town. (R. 49.)

A Resolution was passed authorizing him to discuss the condition of the Manufacturers Bank with any other bank in Rockford, and a letter was delivered to him authorizing it. Baty said he wanted the letter which would be his

authority to go to any other bank in Rockford and discuss the condition of the Manufacturers Bank with the other bank toward carrying out a merger or take-over. (R. 50.) He said if the Security Bank was not taken over by the Swedish Bank or some other bank it would not open for business on Monday morning next, and if the Security Bank failed to open, there will be a run on the Manufacturers Bank. *I don't think your cash reserves are sufficient to withstand a full day's business.* (R. 50.)

In Ekstrom's presence, Baty said to the Directors, the cash position of the Manufacturers Bank was such that if a run took place they would not be able to withstand any undue withdrawals; probably would not be able to withstand the day's business (R. 59-60); and also he said, the cash position was so small that they could not stand an unusual withdrawal on Monday (R. 60-61).

Baty stated to the Directors, including Ekstrom at that time that they could not raise any more cash on their assets and the statement was true. (R. 42.)

(3) With the knowledge gained at that Directors' meeting, Ekstrom left the banking house and went to the office of the Joint Company and there on June 12, 1931, signed a check drawn on the Manufacturers Bank payable to the Third National Bank for the sum of $42,761.12. (There was a claim in both the District Court and Circuit Court of Appeals that the check was written before the meeting, but Ekstrom did not so testify, and the written evidence furnished by respondent was overwhelmingly to the fact that the check was written after the meeting. In this Court the claim seems to have been abandoned. The District Court found the check was written after the meeting. Finding No. 17; R. 191.)

(4) The check above referred to for $42,761.12, drawn in favor of the Third National Bank was received by that

bank through the mail on the early morning of June 13, 1931. That bank added this check to its list of clearings for June 13, 1931, and presented the check through the Rockford Clearing House on said date, and about ten o'clock A. M. (R. 34) it was paid by the Manufacturers Bank through the Clearing House. That the check was received after the original Clearing House list had been made up, is evidenced by the position of the check on the original list. (R. 125-34.) The Bank closed its doors within four hours after this check cleared.

(5) At the same time the above check was written, there were also written by Ekstrom the check of the same company payable to Rockford National Bank for the sum of $35,000.00 drawn on the Security National Bank (a bank he had learned by virtue of his confidential relationship with the Manufacturers National Bank was also in trouble and could not pay its deposits). These checks both traveled together through the company's offices; they were written, signed and put in the mail at the same time. (R. 100.) These two checks were drawn on banks which at the Directors' meeting above mentioned, Ekstrom had learned were in trouble; both were for the purpose of transferring funds from banks which he knew were in trouble to banks which were not then in trouble.

(6) Another Director of the Manufacturers Bank who was a close associate of Ekstrom (R. 108) about eleven o'clock June 13, 1931 caused a transfer of funds belonging to his company to be made by telegraph from the funds of the Manufacturers Bank to a solvent Chicago bank. (R. 111.)

(7) Ekstrom well knew the condition of the bank, for in addition to what was stated to him by the National Bank Examiner as above mentioned, he also knew the following:

(8) The Bank had been examined December 1, 1930, and the Comptroller of the Currency had written the Directors

a letter dated January 8, 1931, in which the precarious condition of the bank was carefully pointed out. Ekstrom had seen a copy of the report of the Examination and had read the letter and testified he was familiar with the contents of the report and that he saw the letter at the time it was received at the bank. (R. 28.) He was present at a Directors' meeting in which the Directors discussed the letter, prepared an answer to it, which he, himself, personally signed. (R. 28.)

(9) The examination of December 1, 1930, was a special examination. In the Report, submitted to the Directors, the estimated losses of the Bank since the last examination were $162,877.12. Doubtful assets with loss probable were $462,105.64. Total slow assets were $1,036,102.10. The Examiner stated that 48 per cent of bills receivable were subject to criticism; that further heavy losses were inevitable. The Examiner stated that the Directors were still borrowing for themselves and for their companies in excess of the Bank's invested capital. (R. 247.) The letter signed by the Comptroller dated January 8, 1930, referred to, "the continued unsatisfactory condition" of the bank. The letter outlined how the loss items and half of the doubtful assets had been handled and showed the organization of Winnebago Securities Corporation and the handling of these items as hereafter set forth. The Comptroller stated to the Directors, "There is much still to be done to put the assets in satisfactory condition." (R. 243.)

(10) Reference was made to Rolling Green Real Estate Subdivision. This was a Subdivision owned as a partnership of three Directors of the Bank. Ekstrom, one of the defendants, who was a director and on the Loan Committee of the Bank; Floberg who was President of the Bank and Director; Olson who was a Director and Vice President of the Bank. This is the same Olson, who, about one hour

and thirty minutes before the bank closed never to reopen, caused to be transferred by telegraph from the assets of the bank, $10,000.00 belonging to a corporation, of which he was President, in substantially the same manner as Ekstrom had done it. (R. 111.)

With reference to Rolling Green, the Comptroller further said, "The loan is greatly in excess of the legal loan limit; that it should be brought within the lawful requirements without further delay." Nothing was done to this loan and it remained in the Bank at its close.

(11) The Bank was examined again on April 27, 1931. A copy of the result of that examination together with a letter of the Comptroller, dated May 28, 1931, consisting of two pages was sent to the Directors of the Bank. The Bank Directors wrote a letter to the Comptroller dated June 9, 1931. The copy of it which was kept in the bank files, was shown Ekstrom on the witness stand. He did not state definitely whether or not he personally signed the letter but stated that if it had been presented to him he would have signed it, and that he might have signed the original.

(12) In the report of examination dated April 27, 1931, it appears the examination consumed the time to May 1, 1931. The estimated losses since the last examination were $19,793.50; the doubtful assets with loss probable, were $430,821.34; (this was after doubtful assets of $400,000.00 referred to in the former report had been removed by way of Winnebago Sec. Corp.); the slow assets were $1,145,-201.17. (R. 253.) (The banks liability on account of checking deposits, alone, was $2,116,109.96.)

(13) The Examiner commented that over 50 per cent of all loans were subject to criticism and that heavy losses were in prospect; also that the "Directors borrowings were still in excess of invested capital. Their lines contained some of the weakest in the Bank. Heavy losses in these lines inevitable."

(Ekstrom at this time owed the bank directly, $53,000.00, with an additional indirect liability of over $31,000.00. R. 53.) The report showed that since the last examination the deposits had decreased $800,000.00.

(14) A copy of the material parts of the letter of the Comptroller dated May 28, 1934, is set out in full in the Findings of Fact of the Court, No. 15. (R. 190-191.)

In this letter last mentioned the Comptroller used the words, "the extremely unsatisfactory condition of assets," and "try to work the Bank out of its present dangerous condition"; also "the bank is faced with potential losses that threaten its solvency."

The evidence shows these reports reflected the true condition of the bank. (R. 54-42.)

(15) In December, 1930, Ekstrom had been a party to a shift or device to take out of the bank $400,000.00 worth of assets which the Comptroller refused to allow the bank to carry longer. (R. 28-29.) This device was the organization of the Winnebago Securities Corporation under the laws of the State of Delaware. The stockholders were Directors of the Manufacturers Bank. It had no capital except that the stockholders raised $98,000.00 in cash. This $98,000.00 in cash was paid to the bank and three notes of the corporation delivered to the bank, cash and notes totaled $397,919.96. For this amount the bank delivered to the Securities Corporation assets of the bank in a like amount which the Comptroller had refused to allow it to carry. The Securities Corporation deposited with the bank the notes received from the Bank, as collateral to the notes of the Securities Corporation. The Securities Corporation had no assets other than the notes purchased from the Bank. The Securities Corporation notes were, one for $50,000.00 due in one year, and another for $125,000.00 due in two years; another for $124,916.96 due in three years from date. Therefore the net result of this shift or device

was, the Bank received $98,000.00 in cash and had no other security than it had before.

(16) At the time last above mentioned, Ekstrom stated he understood if the plan above mentioned was carried out, "the bank could continue operations." (R. 32.)

(17) The Comptroller referred to the device of the organization of the Winnebago Securities Corporation and criticized it by using these words, "The mere changing of the form of losses and doubtful assets to notes of the company with no intention of liquidating them except through salvage from the eliminated assets, which the Examiner states will not be very large, is not a satisfactory manner in which to rehabilitate the Bank and if the notes of the company are not paid promptly when due, it will be necessary for the Examiner to estimate losses on the entire obligation, which would have to be charged off or provided for through assessment against the stock." (R. 190.)

(The stockholders of the Winnebago Securities Corporation were the Directors of the Bank, who already had borrowed in excess of the bank's invested capital, so that the Winnebago Securities Corporation was not in position to pay anything on its notes). (R. 253.)

(18) It was but three days after this letter of June 9, 1931, by the Directors of the Bank to the Comptroller, that M. R. Baty, Bank Examiner, called the meeting of the Directors of the Bank which was held Friday, June 12, 1931 at eleven o'clock A. M. at which time he told the Directors of the trouble in which the Security Bank was and told them the condition of the Manufacturers Bank was such, that it could not hope to continue in business and that it did not have cash reserve enough to withstand one day's run and that such run was expected to occur on the following Monday. The Court found by Finding No. 17, that Ekstrom left this meeting of the Directors and shortly thereafter as

President of the Joint Company executed a check which had the effect of transferring the $42,761.12, in controversy from the failing Manufacturers Bank to the Third National Bank.

Petitioners, in their petition concede the correctness of this finding. The check drawn by Ekstrom as President of the Joint Company did not clear until the next day, Saturday, June 13, 1931, at about ten o'clock A. M. The check itself did not even reach the Third National Bank until on the morning of June 13, 1931. The record shows it did not reach the post office in Rockford from the Joint Company until 6:30 o'clock P. M. June 12, 1931, at which time Ekstrom had all the information contained not only in the statements of the Bank Examiner to the Directors at eleven o'clock A. M., June 12, 1931, but also the result of the reports of examinations and the Comptroller's letters. Regardless of when Ekstrom actually signed the check, the check did not leave Ekstrom's possession until about 6:30 P. M. June 12, 1931; about eight hours before that time, Ekstrom had gained all of the information which he gained at the Directors' meeting at eleven o'clock A. M. of that day. He had then agreed to a Resolution authorizing the Bank Examiner to discuss the affairs of the Manufacturers Bank with another bank with a view to taking over the deposit liability of the Manufacturers Bank.

(19) As heretofore stated the Bank closed its doors never to reopen them at 1:30 P. M. June 13, 1931. On June 16, 1931, the Comptroller of the Currency executed a certificate to the effect that he was satisfied that the Bank was insolvent and unable to pay its just and legal debts. (R. 32.)

(20) The testimony was that there was no substantial change in the Bank's affairs within the last two days that it was open for business except there had been a continued loss of deposits. (R. 109-56.) The only thing that occurred

on the 12th and 13th of June, 1931, that in any way changed the condition of the bank to any extent, was withdrawals of deposits in those two days and a growing unrest of all bank depositors. (R. 64.) At the meeting held Sunday night, June 14, 1931, the Chief Examiner stated to the Directors that the bank was insolvent.

(21) The exact financial condition of the bank and the fact that it could not raise any additional cash to meet demands of its depositors is well shown by the testimony of L. B. Achor. (R. 48-49-69-70-71.) The Examiner had told the bank Directors on June 12th, that there would be a run on the banks as soon as it was learned the Security Bank would not open its doors. The record shows that the Manufacturers Bank lost $72,000.00 in individual deposits Jun 12th. (R. 64.) It also shows that on June 13th, it lost very heavily ($107,175.00) in individual deposits. (R. 64-57.)

(22) In further proof that the Examiner's statement was correct that there would be a run on the banks, the evidence shows that there was in fact a run on the banks on Monday, June 15th, and that the Rockford National Bank itself, which was then a very large institution, lost in deposits on Monday, in excess of $700,000.00. (R. 45.) That bank was then supposed to be impregnable.

(23) There is further evidence of the Bank's actual insolvency at the times above mentioned, which arises from the result of the examination and valuation of the assets of the bank by the joint Committee from the Third National Bank and the Manufacturers Bank. This result was that the capital stock and surplus and reserve accounts of the Manufacturers Bank had all been wiped out and that it took $750,000.00 in addition, to put the assets in such condition that the deposit liability could be assumed by the Third National Bank. This indicated a loss of $1,500,000.00, for the reason that the capital and surplus which had been

wiped out was $750,000.00, and it took new cash in the sum of $750,000.00 or a total as above stated. (R. 67.)

The Bank had borrowed the sum of $156,000.00 of the Federal Reserve Bank and pledged its notes receivable. It had borrowed of the Continental Commercial National Bank of Chicago, $100,000.00, for which it had pledged its notes receivable (R. 44-48); it had previously deposited with the City of Rockford approximately $1,000,000.00 of its notes receivable to secure the City deposit. (R. 44, 49.)

(24) That the withdrawal by petitioners was not in the usual course of business, is evidenced by the fact shown by the testimony, that through the course of many years dealings, petitioners had never transferred funds from the Manufacturers Bank to any other bank by a check of odd figures of dollars and cents. (The transfer check in this instance was $42,761.12.) Their explanation of the fact of odd dollars and cents in the check under consideration, was that when the bookkeeper ordered it drawn he was trying to remember the amount of a deposit he had previously made and to make the check for the same as the deposit. He claims he gave the figures to the stenographer from memory and did not get them exactly right. The deposit had been $44,617.21. (R. 94.) And from the further fact that never before in the history of petitioners had they drawn a check on their checking account in the Manufacturers Bank to their checking account in the Third National Bank. In the Third National Bank they had a payroll account into which at rare intervals they had transferred funds from the Manufacturers Bank, but the transfer was always to the payroll account and never in odd amounts.

(25) Another explanation for drawing the check in question and the other check for $35,000.00 which was drawn for the purpose of transferring funds from the failing Security National Bank, was that the intended purpose was to equalize bank deposits in the different banks, but the record

shows that assuming these transfers to have been made, there would have been in the checking account of the Third National Bank many thousands of dollars more than was usually carried in that account, and there would have been in the checking account at the Rockford National Bank (to which the check on the Security Bank was made payable), many thousands of dollars more than was usually kept in that account. The accounts would have been entirely out of the usual proportion.

A Correction.

On Page 10 of their petition, petitioners say, in attempting to show this court that when the Bank closed, it had available, a half million dollars in cash or its equivalent, that as a part of said amount there was on deposit in the Federal Reserve Bank, the sum of $220,181.21. While it is true such amount was on deposit, and would have been available for use in paying depositors, except for the following: The record shows the Bank had discounted with the Federal Reserve Bank its paper to the extent of $156,000.00, and it was the custom of the Federal Reserve Bank in case of any financial trouble of the borrowing bank, to immediately charge back against the deposit, the amount of the loan. (R. 44 and 48.) So that instead of there being available, $220,181.21 deposited in the Federal Reserve Bank, there would have been, after the loan had been charged against this deposit, only the sum of $64,181.21.

The Facts as to Counterclaim.

The facts in the case are heretofore set out in some detail under the heading "Statement".

Without attempting to here state them, it seems proper to say that while the Directors of the Bank, including Ekstrom, knew the condition of the Bank when they re-

ceived the Comptroller's letter dated May 28, 1931, which was received some time shortly thereafter, and knew the condition of the Bank when the Directors wrote their letter to the Comptroller of June 9, 1931, it was not until at the meeting of June 12, 1931 at eleven o'clock A. M., when the Examiner explained to them the fact that the Bank was in such condition that it could not continue operations, that the Directors and Officers for the first time realized the dangerous situation in which the Bank was. It was within a few hours after this meeting adjourned that Ekstrom signed the check complained about and which resulted in the transfer of funds from the failing bank into a solvent bank, and the evidence shows that no deposits were made in the failing Manufacturers Bank by the petitioners after the Directors' meeting above referred to on June 12, 1931; in fact the record shows (R. 224) that the last deposit was made June 6, 1931, which was three days before the Directors' letter to the Comptroller.

Statutes Involved.

Under this heading in their petition on page 6, appellees have quoted Section 5242 of the Revised Statute. In addition thereto, we quote Revised Statute, Section 5236, (12 U. S. C. A. Section 194), as follows:

> "Sec. 5236.—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make *a ratable dividend* of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives, in proportion to the stock by them respectively held."

Rulings of the Court Below.

Under this heading complaint is made by petitioners of the ruling of the Court in admitting in evidence the report of the condition of the bank for the period ending December 4, 1930, and the letter of the Comptroller which accompanied the report when it was sent to the Directors of the Bank, and also the copy of the report of examination concluded about May 1, 1931, and the letter of the Comptroller dated May 28th, which accompanied the copy of the report which was sent to the Directors.

The evidence shows that these reports of examination correctly reflected the true condition of the Bank. (R. 54.)

We contend that what Ekstrom, as a Director, ought by proper diligence to have known, as to the general course of business in the Bank he was presumed to have known, but in addition to that, the Reports of examination and the letters from the Comptroller, all of which he saw and understood, brought home to his knowledge specifically the dangerous condition of his Bank, and these, in connection with what was said by the Examiner on June 12, 1931, at eleven o'clock A. M. placed him in full possession of all facts relating to the Bank and which would lead any reasonable man to know that the statements of the Examiner were true, and that the Bank was in such dangerous condition that it could not hope to continue in business.

The facts from which the insolvency of the Bank would result were testified to by the witness Achor (R. 48, 49-69-71); the fact of the insolvency was shown further by the evidence that no change was made in the condition of the Bank on June 12th or 13th, 1931 (the latter date being Saturday), except further losses of deposits in a large sum, amounting to $107,175.00 (R. 57), and that shortly thereafter (there being no further business done by the

Bank), the Comptroller certified that the Bank was insolvent.

The purposes of the documents complained about was to bring home to Ekstrom on Friday, June 12, 1931, knowledge of the precise condition of his bank.

Ekstrom himself said that he knew the Bank was on the special list to be examined every 90 days and that the Comptroller had requested the Directors to report to him every 30 or 60 days, and that the request had been made by the Comptroller, "because he wanted the Directors to become familiar with the situation". (R. 25.)

ANSWER TO REASONS FOR GRANTING THE PETITION.

Petitioners say that the petition should be granted because of the case of *McDonald* v. *Chemical National Bank*, 174 U. S. 610. We direct your attention to the fact that in the statement of that case by the court, it is said that the defendant answered, denying its knowledge of the insolvency of the bank in question, and that on the date referred to, it was informed and believed that said bank was ent' ly solvent and dealt with it and gave it credit as a solvent bank. (Page 612.) The answer also was that all of the transactions were made in the usual course of business *and without knowledge*, notice or belief that the bank was insolvent or in danger of becoming so. (Page 612.)

In the opinion in that case, this Court pointed out the fact that the bill of complaint contained no allegation of any payment made in contemplation of insolvency, or of any payment made with a view to prevent the application of the bank's assets in the manner prescribed in the Statute, or of any payment made with a view to the preference of one creditor to another. (Page 617.)

But in the case at bar, those allegations are all made in

the bill, and there was evidence tending to sustain them. In such vital respect, the allegation and the proofs in the two cases are directly opposite.

In addition, there was no question involved of fiduciary relationship and confidential information gained by virtue thereof.

Petitioners also say that the writ should be granted because of your decision in *National Security Bank* v. *Butler*, 129 U. S. 223. That case was decided solely under Revised Statute 5242. You held from the evidence there was no question of fact to be submitted to a jury (Page 232), and that the transfer was made in contemplation of insolvency because it was made after the bank closed its doors. This court, however, held that it was sufficient under the Statute to invalidate a transfer if it was made in contemplation of insolvency, and with a view to prevent the application of the assets of the bank as prescribed in the Statute, or with a view to the preference of one creditor to another. (Page 231.)

We suggest the decision in the Butler case supports the decision of the Circuit Court of Appeals, in the case at bar.

Petitioners say that the decision in the case at bar is directly in conflict with the decision in *Hayden* v. *Chemical National Bank*, 84 Fed. 874. This case is but the decision of the Circuit Court of Appeals in the case which was afterwards known in this court as, *McDonald* v. *Chemical National Bank*, (174 U. S. 610), above referred to. Hayden was originally the Receiver, and McDonald was afterwards appointed, which accounts for the difference in name of the parties. However, the opinion of the Circuit Court of Appeals emphasizes the facts above referred to in this brief.

It said, "The court below held the alleged preferences

'were received innocently by the defendant' ". And further, "There is not the slightest evidence that the defendant was aware of or suspected the real situation."

Petitioner also claims that because of the decision in *Nelson* v. *Lewis,* 73 Fed. (2d) 521, the writ in the case at bar should be granted. In that case, however, the creditor denied knowledge of the bank's condition, and the court held that the payment was made in the "ordinary course of business", and defined those terms as being "the taking of deposits and paying of withdrawals in the customary manner".

In the case at bar not only did Ekstrom have imputed knowledge, but he had actual knowledge at the time he made the withdrawal. Our contention is that having inside, confidential information which he gained because of the fact he was a Director of the bank, when Ekstrom used that information so acquired which was not so possessed by the other depositors of the bank, he was not acting in the ordinary course of business. That the other directors and its Officers, possessing the same information which Ekstrom possessed, were not acting in the usual course of business, in paying the check drawn by Ekstrom.

In the case at bar Ekstrom drew the check after he had voted to give authority to a Bank Examiner to discuss the affairs of his bank with another bank with a view of having the other bank take over and secure the deposit liability of his own bank. We insist that a court is justified in finding as the lower courts found, that the act of Ekstrom and of the bank were in contemplation of the fact that the bank could not continue business, and if their deposit liability was not taken over by another bank would be forced to suspend.

Petitioner also says the writ should be granted because of the decision in the case of *Rucker* v. *Kokrda,* 68 Fed.

(2d), 73. In that case, however, on Page 74, the court said, "there was no proof and no finding that he had any inside information as to the bank's condition". In the case at bar there was proof of inside information acquired in a confidential capacity, and the District Court found that at the time he drew the check, Ekstrom had inside, confidential information which he had acquired by virtue of his office as a Director. Findings 11, 12, 13, 14, 15, 16, 17, 18, and 19. (R. 188-192.) Conclusions of law, 4, 5. (R. 234, 235.)

I.

What is said under this number by petitioners on Page 16 of their petition is predicated upon the words occurring in the fourth line "to a bona fide creditor". While this creditor may have been a "bona fide creditor", in the sense that it had a deposit in the bank, yet in withdrawing the deposit they took advantage of other depositors who did not have the confidential information which Ekstrom had acquired by virtue of holding a fiduciary relation with the bank. See, Conclusions of Law 4. (R. 234.)

II AND III.

We think the finding of the District Court, sustained by the evidence, and particularly its Conclusion of Law Nos. 8 and 9 (R. 235), differentiate the case at bar from the case supposed under this number on Page 17 of their petition.

IV.

We think counsel misapprehends the facts and the holding of the lower courts thereon. The District Court found not only that Ekstrom, a Director of the Bank, intended to prevent the assets of the Bank from being ratably distributed, but also that the Officers of the Bank, acting with the knowledge of the directors, were placed in a position where they could allow Ekstrom to take advantage of his knowledge, confidentially acquired, and that the act of the Directors and of the Officers in allowing the check to be paid under the circumstances, created a preference, and the parties were presumed to intend the results of their act. And that the act was done in contemplation of the insolvency of the bank. See, Conclusions 5, 6, 7 and 8. (R. 283.)

The respondent respectfully asks the court to deny the writ.

Respectfully,

ROY F. HALL,
Rockford, Illinois,
Solicitor for A. B. Culhane, Receiver, etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

BRIEF.

I.

We respectfully submit to the court that when the facts are considered in the cases cited in this number, on page 20 of the petition, there is no conflict in the decisions of the courts. Each case had a different set of facts, and those facts are different from those in the case at bar.

We submit to the court that the law stated in the following cases is the law which should govern in this case.

EFFECT OF KNOWLEDGE ACQUIRED THROUGH CONFIDENTIAL RELATION.

There was a violation both of statutory duty and common law duty. Where one receives his deposit from a bank, where the bank contemplates insolvency and the person receiving the deposit has acquired information of the facts from a confidential source connected with the bank, or as is sometimes called, "inside tip," the transaction is not in the ordinary course of business and may be avoided as a preference.

American Surety Co. v. *Jackson* (C. C. A. 9th) 24 Fed. (2d) 768-769.

Fed. Res. Bank v. *Omaha Natl. Bank* (C. C. A. 8th) 45 Fed. (2d) 511.

Swentzel v. *Penn Bank,* 147 Pa. 153; 23 Atl. 415, 416.

Lamb v. *Ulrich,* 94 Okla. 240; 221 Pac. 741.

A fraudulent transaction does not change its character by clothing itself in the respectable habiliments of the "ordinary course of business."

Fed. Res. Bank v. *Omaha Natl. Bank* (C. C. A. 8th) 45 Fed. (2d) 511, 519.

In the case last above cited, at page 519, the court said the case was clearly distinguishable on the facts from the case of *McDonald* v. *Chemical Natl. Bank,* 174 U. S. 610.

A clear exposition of the rights of the parties, where a depositor, with confidential information, withdraws his deposit when a bank is about to become insolvent, is contained in the following opinion,—

Rice v. *City of Columbia,* 143 S. C. 516, 536; 141 S. E. 705.

The distinction is clearly made between the rights of one

who *without knowledge of bank's insolvency* withdrew his deposit a day or two before failure, and one who *with knowledge* of insolvency, withdrew his deposit. In the latter case the transaction is subject to be set aside and annulled as in conflict with the statute.

Vann v. *Fed. Res. Bank of Richmond*, 47 Fed. (2d) 786.

First N. B. & T. Co. v. *Manning*, 116 Conn. 335, 164 Atl. 881.

Corbin v. *Mumford*, 148 Fed. 37.

The *Vann* case was cited with approval on another point in,

Hirning v. *Fed. Res. Bank*, 52 Fed. (2d) 382.

Further authority that it is unlawful for officers and directors of a national bank with knowledge acquired in their capacity as such, to withdraw their funds is found in,

Julius v. *State*, 113 Okla. 7; 237 Pac. 605.

Smith v. *McCowan*, 60 S. D. 504; 244 N. W. 891-893.

Smith v. *Tattersfield*, 60 S. D. 466; 245 N. W. 49.

James Clark Co. v. *Colton*, 91 Md. 195.

Directors cannot, *in justice to those who deal with the bank*, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect officers of the bank, and to make declarations of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers, upon the basis of that course of business.

Bowerman v. *Hamner*, 250 U. S. 504-514.

In determining whether insolvent bank, permitting withdrawal on last day it was open for business, intended to give unlawful preference, managing officers held charged with full knowledge of bank's condition.

South Carolina State Bank v. *Stokes*, 169 S. C. 173.

There comes a point in the affairs of a bank which is approaching insolvency, where the assets of the bank become, in the hands of directors, a trust fund for the benefit of all creditors. Undoubtedly this doctrine may be invoked at an earlier time when Directors themselves are dealing with their corporation. See quotation from Judge Seymour Thompson.

15 Fletcher Cyc. Corp., pp. 516-517—note 25.
15 Fletcher Cyc. Corp., Sec. 7469, page 681.
8 Thompson on Corp., Sec. 6153, page 269.

CORPORATION BOUND BY KNOWLEDGE OF ITS PRESIDENT.

Where the President of a corporation *actually acts for the corporation,* it would be a travesty to say his knowledge relating to the very thing which he was doing, would not bind his corporation, however the knowledge was acquired.

21 R. C. L. Page 841, Sec. 22.
3 Fletcher Cyc. Corp., page 71, Sec. 811.
3 Fletcher Cyc. Corp., page 42, Sec. 797.

"There is no other officer or agent to whom notice could have been made with more propriety."

Porter v. *Bank of Rutland*, 19 Vt. 410, 425.

Contemplation of Insolvency.

A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that it will presently be unable to meet its obligations.

First Natl. Bank of Ortonville v. *Andreson,* 57 Fed. (2d) 17, 19.

A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will *presently* be unable to meet its obligations *and will be obliged to suspend its ordinary operations.*

Park v. *Knapp,* 29 Fed. (2d) 547-549.

Browne v. *Stronach,* 7 Fed. (2d) 685.

Referring to officers of a bank, in connection with approaching insolvency, it has been said,—"They doubtless hoped to defer the event indefinitely by concealing the real condition of affairs; *but they took counsel of their hope and not of their judgment* when they contemplated any prolonged postponement."

Park v. *Knapp,* 29 Fed. (2d) 547-549.

"The hopeless insolvency of the bank was within the contemplation of the officers, if they would contemplate it; that they did not, should not, it seems, take the case out of the statute. The insolvency of the bank was before them and with it before them they gave this creditor a preference." This seems to be within the statute.

Brill v. *McInness,* 4 Fed. (2d) 306.

A bank is in "failing circumstances" when in a state of uncertainty as to whether it will be able to sustain itself, depending upon favorable or unfavorable contingencies which in the course of business may occur and over which its officers have no control.

2 Morse on Banks & Banking, page 1034.

Insolvency as applied to banks is defined, as inability to pay its debts in the usual and ordinary course of business.

State v. *Burlingame*, 146 Mo. 207.

A bank is "in contemplation of insolvency" when the fact becomes reasonably apparent to its officers that the bank will presently be unable to meet its obligations and will be obliged to suspend ordinary operations.

U. S. Pipe & Foundry Co. v. *City of Hornell*, 146 Misc. 812; 263 N. Y. S. 89.

A bank is insolvent when it is unable to meet its current obligations as they mature, though its assets may be greatly in excess of its liabilities. While as to an ordinary corporation they are not said to be insolvent, if the entire property and assets are sufficient to meet the liabilities by way of liquidation. This rule does not apply to banks.

Florida Bank & Trust Co. v. *Yaffey*, 102 Fla. 723.

Insolvency within the meaning of Revised Statute 5242, consists in inability to meet obligations in ordinary course as they accrue.

Federal Intermediate Credit Bank v. *L'Herisson*, (C. C. A. 8th) 33 Fed. (2d) 841.

RELATION OF EKSTROM TO THE BANK AND CORPORATION.

The relation of Director to corporation is of such a fiduciary nature that transactions between Board having common members are regarded as jealously by the law as are personal dealings between a Director and his corporation, and where the fairness of such transaction is challenged, the burden is upon those who would maintain them to show their entire fairness; * * * this court has been consistently emphatic in the application of this rule which it has declared, is founded in soundest morality, and we now add, in the soundest business policies."

Geddes v. *Anaconda Mining Co.*, 254 U. S. 590, 599.

IF THERE IS LIABILITY IN THIS CASE THE JOINT COMPANY OF COURSE IS LIABLE BECAUSE IT RECEIVED THE MONEY. BUT EKSTROM, WHO ACTED FOR IT, IS ALSO LIABLE.

Where the element of duress or forced payment *or of knowingly participating in an unlawful act exists,* the rule is, the fact that the relationship of principal and agent exists, does not relieve the agent, whose personal participation made possible the wrong committed. *In such cases both the principal and agent are wrongdoers and may be sued jointly or severally.* This is true even though the Agent did not profit thereby. The act was obviously wrong and the party participating in such a wrong may not exonerate himself by showing that he was acting for another.

Vann v. *Fed. Res. Bank of Richmond,* 47 Fed. (2d) 786, 788.

"The defendant, though acting as [illegible] actively participated in the commission of the to[illegible], and judgment was rightly rendered against both defendants."

First Natl. Bank & Trust Co. v. *Manning,* 116 Conn. 335; 164 Atl. 881, 883.

The reserve bank participated in those transfers * * *; the action of the reserve bank as Agent helped bring about the preference. What the reserve bank did, it did with full knowledge of the insolvency of the Brookings Bank. It was contended that the bank was merely an agent and therefore could not be held liable. The Circuit Court of Appeals held that it was liable notwithstanding it acted as Agent.

Hirming v. *Fed. Res. Bank,* 52 Fed. (2d) 382.

A suit was brought against a bank on the theory that it was liable for a fund by reason of having knowingly participated in a wrongful withdrawal. The Supreme Court of

Arkansas said, "The theory is correct, and if the evidence in the case sustains a finding that appellee bank participated in the wrongful act, the banking commissioner is entitled to recover for the creditors of the defunct bank, the amount of the funds thus wrongfully diverted."

Rainwater v. *Merchants Natl. Bank,* 172 Ark. 284.

It is entirely proper for the court to enter a money judgment and in addition thereto order an individual defendant to pay, and if he does not, to commit him until he does pay.

> "It is a case where the funds of an insolvent concern in violation of the Bankruptcy Act *were appropriated by one occupying a position of peculiar trust toward all the creditors,* for the purpose of settling his own debt, *and to that extent depriving the other creditors of their right to distribution* under the law creating a uniform system of bankruptcy."

Corbin v. *Mumford,* 148 Fed. 47.

This court treated the Bankruptcy law and the National Banking law as of practically the same import.

Rechtor v. *City Deposit Banking Co.,* 200 U. S. 405-418.

THE OBJECTS AND PURPOSE OF REVISED STATUTE, SECTIONS 5242 AND 5236.

The object of the statutes is to secure equal distribution, and to prevent conduct which the officers of the insolvent bank can perceive, in the exercise of reasonable foresight, will prevent the fulfillment of that object.

First Natl. Bank of Ortonville v. *Andreson,* 57 Fed. (2d) 17-20.

The requirement that the assets be divided ratably and proportionately is so strong, that it was held, a law of New York which required that upon liquidation of an insolvent bank, the money of a savings bank on deposit

should have preference and be paid in full, was in contravention of the Act of Congress requiring the proceeds to be ratably distributed. The following opinion goes fully into the purpose of the Act; it shows that even the Statute passed by Congress that all debts of the United States should be preferred, must give way to the general purposes mentioned in the Act, to the end that all funds should be ratably distributed.

Davis v. *Elmira Savings Bank,* 161 U. S. 275.

Section 5236 establishes by Federal law a system of equal distribution of assets of National Banks.

Jennings v. *U. S. F. & G. Co.* 294 U. S. 216, 226.

COUNTERCLAIM.

The burden is on the plaintiff who is seeking to recover from a Receiver of an insolvent bank, a deposit made shortly before the bank closed, to show *that real fraud was practiced upon the depositor, which requires affirmative proof that the bank was actually insolvent when it received the deposit and that its managing officers knew such to be the fact.*

Fidelity & Deposit Co. of Maryland v. *Kelso State Bank,* 287 Fed. 828.

The Circuit Court of Appeals has distinguished between the knowledge which it is necessary to prove on the part of the officers when they are charged with receiving deposits knowing the bank to be insolvent, and the knowledge which must be proven on the part of the officers in order to recover back a deposit.

Fidelity & Deposit Co. of Maryland v. *Kelso State Bank,* 287 Fed. 828.

To give the depositor the right of reclamation, insolvency must have been of such a character that it was mani-

festly impossible to continue business and meet obligations, and that it must have been known to the officers when they accepted deposits.

In re Gubelman, 10 Fed. (2d) 926.

It is held to be a fraud for the bank to receive a deposit *from an innocent depositor ignorant of the bank's condition* when it is known by its officers to be insolvent at the time they accepted the deposit.

3 Michie on Banks & Banking, page 109, Sec. 69.

It must be shown that the officers of the bank knew of its insolvency and received the deposit fraudulently.

William v. *Cox,* 97 Tenn. 555.
Showalter v. *Cox,* 97 Tenn, 547.
People v. *St. Nicholas Bank,* 28 N. Y. Supp. 407.
In re Beers, 28 N. Y. 422.
3 Michie on Banks & Banking, page 110.
Goshorn v. *Murray,* 197 Fed. 407.

Knowledge on the part of the officers cannot be presumed. It must be proven.

Quinn v. *Earle,* 95 Fed. 728.

It must be shown that the officers knew of the insolvency when the deposit was received, *while the depositor did not know it.*

In re Stewart, 178 Fed. 463.

ARGUMENT.

I.

CONFLICT OF DECISIONS.

If we understand the decisions correctly, there is no conflict in them. In each instance, so far as we have been able to find, where a Director acquired confidential information by virtue of his office, that his bank was in trouble, and by virtue of that knowledge, which was not possessed by other depositors, he withdrew immediately before the bank closed its doors, either his own deposit or deposits belonging to others, the Director so withdrawing funds and the person for whose benefit they were withdrawn, have been required to return them to the bank.

The only exception so far as we have been able to find is the case of *O'Brien, Receiver* v. *East River Bridge Co.* 161 N. Y. 539, cited by petitioners on Page 33 of their argument.

This case seems to sustain their contention. It is not precisely on all fours with our case but nearly so. It was decided under the General Corporation Act of the State of New York. The State of New York evidently does not have the same definite, fixed public policy as does the United States as indicated by the statutes cited and in the case of *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, and in *Jennings* v. *U. S. F. & G. Co.* 294 U. S. 216, at Page 226.

The *O'Brien* case seems to stand alone, but it was decided under the law of New York and the Courts of that State may determine what the law of the state is, but a decision of that kind cannot be considered as authority when it leads to a conclusion which is inconsistent with

the system of equal distribution established by the Federal Law. The decision has been differentiated several times by the inferior Appellate Courts of the State of New York and even criticized by some of them. The decision is at variance with the great weight of authority.

If the law is as stated in the *O'Brien* case and one director of the bank may withdraw the deposit of his corporation, then all directors of the bank may withdraw all the deposits of all the corporations in which they are interested. By this process the assets of the bank could be so depleted that the little depositor,—the man without means of obtaining inside information,—the man without influence in the circles of that particular bank, could be completely deprived of his right to share equally in the assets of the bank. The "system of equal distribution established by Federal law," could be completely set aside.

If one director can with confidential knowledge acquired during a fiduciary relation, withdraw a small deposit of his corporation, he could withdraw a large deposit; if one director can withdraw a large deposit, every other director may withdraw a large deposit.

If a director can thus prefer his own corporation by acting for it when the bank is about to fail, then the law of the United States with reference to ratable distribution of the assets of a failing bank, then the public policy of the United States to treat every citizen in every state exactly alike, has been set at naught.

When one contemplates the facts as they appear from the report of the Examiner to the Comptroller, that thirty-one per cent (31%) of all the loans held by the Manufacturers Bank were from Directors and corporations in which they were interested, then one can see that if these same Directors were permitted to transfer from the bank all of the deposits, which the corporations in which they

were interested had in the bank, then the bank would be but a shell. Surely it is not the policy of this Government to permit Directors and corporations in which they are interested, to borrow 31 per cent of all the money loaned by the bank and then when clouds begin to gather, let these same directors withdraw the deposits of the corporations in which they are interested.

We need not go further than the facts in this case at bar to show what might be done. Director Ekstrom withdrew $42,761.12 of his corporation's deposit by a thinly veiled scheme to make it appear that he had done so "in the ordinary course of business," and Director Olson withdrew $10,000.00 of his corporation's money by a more bold scheme. Olson directed it to be done by telegraph. (R. 111.)

It is said on Page 31 of the petitioners' Brief and Argument "Ekstrom had a substantial deposit in the bank in his own name but he did not seek to take advantage of the information which he had received as a director of the bank, to withdraw any of his own money." Why should Ekstrom withdraw his own deposit? He owed the Manufacturers Bank at that time over $50,000.00 direct liability, and over $30,000.00 indirect liability. (R. 53.) This was many times the deposit he had in the bank.

At the same place in their Argument, petitioners say he did not profit by the withdrawal of the corporate funds. We do not know whether or not he profited. The record does not show. If he could withdraw the corporate funds and thus save his company nearly $50,000.00, who knows what profit directly or indirectly might be his. But at any rate, the fact that he did or did not profit is not the test. Ekstrom's act, if approved, tended to prevent the application of the salutary principle, of ratable division of assets.

II.

The case of *Sanford Ford & Tool Company* v. *Howe-Brown Company*, 157 U. S. 312, is cited under this number.

In the absence of a Statute from which a different policy would result, the common law permitted a failing debtor to prefer one creditor to another. But as applied to a National Bank, such policy "is plainly inconsistent with the system of equal distribution established by the Federal laws". (*Jennings* v. *U. S. F. & G. Co.* 294 U. S. 216, at Page 226.)

CONCLUSION.

Under this heading it is stated by petitioners that when the bank closed on Saturday, it closed with the expectation of opening for business on the succeeding banking day, Monday.

The statements heretofore referred to made by the Examiner on June 12, 1931, to the Directors of the bank indicated very clearly the condition of the bank and that the bank would not be able to continue business the next Monday morning, and that between the time it closed Saturday, and Monday morning, it would be necessary in some way to secure the deposit liability. With the condition of the bank as it has been heretofore stated, each director is presumed to know that the bank could not continue in business. At that time the bank passed a Resolution which was seconded by Director Ekstrom, as follows: "That Examiner M. R. Baty be authorized to discuss our condition and assets with any other bank in Rockford toward a sale or merger". The Officers and Directors then gave the Examiner a letter authorizing him as stated in the Resolution. Not only so but the bank appointed a Com-

mittee to represent the Board of Directors in any such negotiations. (R. 127.)

After the short business day of Saturday the bank did no further business. The Comptroller found it was insolvent and could not pay its debts as they matured. There was no change in the last two or three days the bank was open for business except there was continued loss of deposits and a growing unrest among depositors. (R. 109, 56.)

The Examiner immediately discussed the condition of the bank with the Directors of the Third National Bank which was done at the suggestion of Director Olson made at the meeting. (R. 110.) After his talk with the Third National Bank the Examiner reported to the Committee.

Saturday night the Directors of the Third National Bank and the Committee of the Manufacturers Bank spent all night and until seven o'clock Sunday morning in valuing the assets and in an endeavor to protect the deposit liability of the Manufacturers Bank. The negotiations were continued through Sunday and when it was found necessary to raise $750,000.00 in cash before anyone could be found to guarantee the deposit liability of the Manufacturers Bank, and it was ascertained this amount could not be raised, the Directors voted to close the bank and stated the action was "due to frozen and non-liquid assets". (R. 126.) Thus it appears from Friday, June 12, 1931 successive steps were taken, each one of which indicated the bank could not proceed and resulted logically in the Resolution closing it.

Respectfully submitted,

ROY F. HALL,
Rockford, Illinois,
Solicitor for A. B. Culhane, Receiver.